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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN AND DOLORES RANK,

Petitioners,

vs.

ROBERT P. NIMMO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

A federal statute (38 U.S.C. § 1816(a)) grants the Administrator of the Veterans Administration (VA) the discretion to refund a VA-guaranteed home loan and assign the loan to the VA, which can then arrange for payments on that loan which will allow a deserving veteran going through temporary hard times to keep his or her home. The question presented is whether the Administrator, who admittedly has wide discretion in an individual case, may refuse to exercise that discretion by refusing to consider <u>any</u> loan for an assignment.

LIST OF PARTIES BELOW

The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit were:

1. Max Cleland, in his capacity as Administrator of the Veterans Administration; the court below subsequently substituted the name of his successor, Robert P. Nimmo.

2. John Miller, in his capacity as Director of the Los Angeles Regional Office of the Veterans Administration.

3. The Veterans Administration, an agency of the United States government.

4. The Kissell Company, an Ohio corporation.

5. John W. Rank, a citizen of California.

6. Dolores Rank, a citizen of California.

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The petitioners, John and Dolores Rank, plaintiffs and appellees, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 23, 1982, and modified by separate order filed on May 6, 1982.

OPINION BELOW

The opinion of the Court of Appeals and the Order modifying that opinion, reported at 677 F.2d 692 (9th Cir. 1982), appear in the appendix hereto. The judgment of the District Court of the Central District of California, entered October 3, 1978, and the Findings of Fact and Conclusions of Law filed July 7, 1978,

reported sub. nom. Rank v. Cleland, 460 F. Supp. 920 (C.D. Cal. 1978), also appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 23, 1982 and modified by separate order on May 6, 1982. A timely Petition for Rehearing and Rehearing En Banc was denied on May 6, 1982, and this Petition for Certiorari is to be filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 38:

Section 1816(a):

In the event of default in the payment of any loan guaranteed under this chapter, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. Before suit or foreclosure the holder of the obligation shall notify the Administrator of the default, and within thirty days thereafter the Administrator may, at the Administrator's option, pay the holder of the obligation

the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security. Nothing in this section shall preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Administrator.

United States Code, Title 5:

Section 706(1):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action lawfully withheld or unreasonably delayed;

STATEMENT OF THE CASE

John W. Rank, a veteran, and his wife Dolores bought a home secured by a loan guaranteed by the VA. See 38 U.S.C. §§ 1801 et seq. They fell behind on their loan payments when John Rank was laid off from his job because of an economic recession. The Ranks tried repeatedly to persuade the servicer of their loan, The Kissell Company, to grant them forebearance, and proposed partial payment plans to the company. They also sought to persuade the VA to intercede on their behalf. The Ranks' efforts were unsuccessful and Kissell instituted nonjudicial foreclosure proceedings. Findings of Fact 1-36,[1/]

1/The Findings of Fact and Conclusions of Law were renumbered when the trial court published them. The citations in this petition are to the orignal Findings and Conclusions as reproduced in the Appendix.

Appendix at 86.

The VA failed even to consider exercising its option under 38 U.S.C. § 1816(a) to assign the Ranks' loan to itself and provide direct forebearance to the Ranks. As with every other loan in the Los Angeles area, a VA official merely completed a form by crossing out the word "IS" in the sentence "REFUNDING IS/IS NOT WARRANTED." Appendix at 126. From 1974 through 1976, when the Ranks' loan was in default, there were more than 6,000 foreclosures of VA-guaranteed home loans in the Los Angeles area, but the VA did not assign and refund one single loan. Findings of Fact 38, 55, Appendix at 101, 106. In addition, the Ranks were never even informed of the possibility of assignment. Findings of Fact 58, Appendix at 107. As the district court ultimately concluded,

"From 1974 through 1976 . . . VA refused to implement the assignment program in the Los Angeles region." Conclusion of Law 12, Appendix at 113.

Following the foreclosure proceedings, the Ranks filed suit in federal district court seeking to set aside the foreclosure. The district court found that jurisdiction lay under 28 U.S.C. § 1331(a) (federal question); and 28 U.S.C. § 1361 (mandamus). 460 F. Supp. at 926, Appendix at 111.

On cross motions for summary judgment, the trial court ruled in favor of the Ranks. The court ordered that the foreclosure of their loan be set aside and that the matter be remanded to the VA to decide whether to grant the Ranks an assignment.[2/] Appendix at 76.

2/ The Administrative Procedure Act directs reviewing courts to "compel agency action unlawfully withheld . . ." 5 U.S.C. § 706(1).

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Judge Reinhardt, in a carefully reasoned opinion, dissented on the issue of the VA's failure to exercise its statutory discretion. He concluded that "the VA cannot ignore the [assignment] statute." 677 F.2d at 705-06, Appendix at 58.

The Ranks petitioned for rehearing and suggested rehearing en banc, focusing solely on the issue of the VA's failure to exercise discretion under the assignment statute. The Court of Appeals denied the petition and rejected the suggestion, with Judge Reinhardt again dissenting. Both the majority opinion and dissent were modified at that time.

REASONS FOR GRANTING THE WRIT

This Court has never squarely decided the question whether a statute that grants an administrative agency wide authority to exercise individualized discretion permits a refusal to exercise that discretion. The Court of Appeals opinion can be fairly read for the proposition that administrative agencies need not exercise their discretion under statutes worded in non-mandatory terms unless Congress expressly specifies otherwise. As will be discussed, this opinion raises an issue that should be decided by this Court because of the question's impact on the relationship between the executive and legislative branches; the inconsistency of the opinion with prior appellate decisions;

and the damage done by the opinion to the Congressional goal of aiding veteran homeowners.

I. THE COURT OF APPEAL'S VALIDATION OF AN ADMINISTRATIVE AGENCY'S REFUSAL TO EXERCISE STATUTORY DISCRETION THREATENS TO ALTER THE RELATIONSHIP BETWEEN CONGRESS AND ADMINISTRATIVE AGENCIES

The decision below, by validating the VA's refusal to exercise its statutory discretion, threatens the delicate balance between the legislative and executive branches in implementing discretionary statutes. The United States Code contains literally hundreds of statutes that grant discretion to administrative

agencies to implement Congressional policy in individual cases; Title 38, which governs the VA, contains at least 30 such statutes. Often the statute will specify standards for implementation, and the exercise of that discretion will be subject to judicial review. 5 U.S.C. § 701; see generally Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). Occasionally, however, "'statutes are drawn in such broad terms that in a given case there is no law to apply'" and the exercise of discretion under that statute will be unreviewable. Id. The court below held that Title 38, Section 1816(a), which allows the VA Administrator, "at his option," to refund and assign VA-guaranteed home loan, is such a statute. The Ranks in this petition do not contest that holding.

It does not follow, however, that because a statute does not prescribe standards sufficiently detailed to invoke judicial review the statute can therefore be ignored. To take that leap of logic, as the Court of Appeals did, misinterprets the purpose of standardless statutes and places both Congress and administrative agencies at a disadvantage.

Standardless statutes, as this Court has recognized, allow Congress to defer to recognized areas of administrative expertise. Fahey v. Mallonee, 332 U.S. 245, 250 (1947). In this case, Section 1816(a) defers to the expertise of the VA in balancing the needs of the government and the veteran in a particular case and determining whether a loan assignment should be granted. But the refusal to make that individual determination requires

no expertise. At best, the VA's refusal to exercise discretion is a policy decision that a statute should not exist. Congress, not the VA, should make that policy decision. Or, at least Congress should expressly state that the agency has the expertise justifying a refusal to exercise statutory discretion.

The opinion places Congress and ultimately administrative agencies in an untenable position. In order to prevent the kind of nonfeasance exhibited by the VA in this case, Congress would have to review the numerous standardless statutes such as Section 1816(a). For each statute, it would either have to add superfluous language directing that the statute should not be ignored and discretion must be exercised, or impose standards governing the exercise of discretion. In either

case, Congress would run the risk of placing rigid restraints on the exercise of agency discretion, a result which would be undesirable for Congress, administrative agencies and the general public. A better solution would be to preserve the judicial presumption that when Congress grants an agency discretion, it intends that the discretion be exercised unless expressly stated otherwise.

II. THE OPINION BELOW IS VIRTUALLY UNPRECEDENTED, AND RUNS COUNTER TO CASE LAW PROSCRIBING ADMINISTRATIVE FAILURE TO EXERCISE STATUTORY DISCRETION

The opinion below conflicts with case law generally prohibiting administrative failure to exercise statutory discretion. While this Court has never directly decided the issue herein, on at least two occasions the Court has assailed administrative refusal to exercise discretion. In Accardi v. Shaughnessy, 347 U.S. 260 (1954), an immigrant challenged the denial by the Board of Immigration Appeals of his application for suspension of deportation. This Court held that the Board was required

to make an individualized determination of the immigrant's right to suspension of deportation and could not automatically exclude him on improper grounds. The Court stated, "It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. . . . Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations." Id. at 268 (emphasis in original). In Phelps Dodge v. Labor Board, 313 U.S. 177 (1941), the Court condemned a National Labor Relations Board action taken without consideration of the individual circumstances involved in the case. "All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." Id. at 197.

Closer to the facts of this case is United States v. Edwards, 368 F.2d 722 (4th Cir. 1966), which concerned a challenge by a claimant to the failure of the Treasury Secretary to remit forfeited property. Without examining the language of or the intent behind the remission statutes, the court assumed the general validity of the proposition that remission of forfeitures of "this kind of taxable property is within the sole, exclusive, and discretionary province of the Secretary of the Treasury and the courts are without power to review his decisions." 368 F.2d at 723. Nevertheless, the court declared, "it is still somewhat startling to be told by counsel for the United States in oral argument that taxpayer's petition for administrative relief had been denied but that no reasons for the denial had

been communicated to the taxpayer. It is further asserted to us . . . that it is the invariable policy of the Secretary to deny such claims for remission of forfeiture . . ." Id. at 723-24.

The appellate court vacated a district court ruling against the taxpayer and suggested that the trial court determine on remand, inter alia, "to what extent, if at all, is there an established policy in the Treasury Department to deny such applications without consideration of the merits." Id. at 724. The court suggested that if the allegations were true the Secretary should be ordered to act upon the merits of the remission application. In the present case, in which the Ranks were never even told of the possibility of assignment, much less given reasons for denial (Findings of Fact

58, 59, Appendix at 107), and the administrative policy of nonfeasance has been proved, the judgment of the district court requiring a similar exercise of discretion should have been affirmed.

The Ninth Circuit itself has condemned the failure to exercise discretion in other cases. In Standard Oil Co. of Cal. v. F.T.C., 596 F.2d 1381 (9th Cir. 1979), reversed on other grounds, 449 U.S. 232 (1980), an oil company challenged the Federal Trade Commission's initiation of a complaint against it, alleging that the agency violated a statute providing that the FTC may file a complaint against a company if it has determined that there is a "reason to believe" that illegal practices have taken place. The court held that if "the district court finds that the complaint was issued . . . with

complete absence of a 'reason to believe' determination, then the FTC has not complied with the Act." Id. at 1386. Significantly, the court did not refer to any express Congressional intent that the statute be implemented. See also Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971), holding that a statute giving the Commissioner of Indian Affairs the power to promulgate such regulations governing trading posts "as he may deem just and proper" did not permit him to refuse to regulate.

The only authority relied on by the Court of Appeals in support of its decision to validate VA inaction is Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958), a case first cited by the court below in its order denying rehearing.

Panama Canal Co. involved a challenge by shipping companies to the considered refusal of an administrative agency to lower allegedly improper tolls, as opposed to a complete failure to exercise discretion. The Court's sweeping statement that "the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" can only be viewed as dictum, as the refusal to lower tolls in that case was action, not inaction.

Furthermore, the precedential value of Panama Canal is very much open to question. It has never been cited or relied upon by this Court in any subsequent case treating the reviewability of an agency's action or inaction. The Fifth Circuit has stated, "[T]he continued vitality of the Panama Canal case as precedent is

questionable," Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1391, n.14 (5th Cir. 1979), while Judge Friendly labeled it "inscrutable." Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (1971). In addition, there are numerous cases which mention Panama Canal, but draw factual distinctions in order to render it irrelevant. W.G. Cosby Transfer & Storage Corp. v. Froehlke, 480 F.2d 498, 503 (4th Cir. 1973), Kentucky Utilities Co. v. Tennessee Valley Authority, 375 F.2d 403, 415 (6th Cir. 1967), Dutchess County Aviation v. Adm. of the FAA, 251 F. Supp. 426, 429 (S.D.N.Y. 1966). The Ninth Circuit's reliance, without reservation on the most sweeping dictum in Panama Canal threatens to lead to wholesale approval of administrative nonfeasance in defiance of more recent, better reasoned authority. For

that reason alone, the issue justifies a hearing in this court.[3/]

3/ The Third Circuit, a few weeks after Rank was first issued, made a similar holding in Gatter v. Nimmo, 672 F.2d 343 (3d Cir. 1982). The Gatter ruling was based almost entirely on the Third Circuit's conclusion that the assignment legislation was intended primarily to benefit the government rather than veterans. The accuracy and significance of that conclusion will be discussed in the next section.

III. THE OPINION BELOW UNDERMINES THE CONGRESSIONAL GOAL OF AIDING VETERAN HOMEOWNERS

The question raised herein is significant not only because of its effect on administrative law, but also because it touches upon the interests of hundreds of thousands of veteran homeowners (see Finding of Fact 37, Appendix at 101). whom Congress intended to benefit. By allowing the VA to remove the only weapon in its arsenal to aid a worthy veteran facing foreclosure, the opinion below thwarts the will of Congress.

By footnote (677 F.2d at 700-01, n. 13, Appendix at 44), the opinion below suggests, and the Third Circuit in Gatter v. Nimmo, supra, 672 F.2d 343, states that the assignment clause in Section 1816(a)

was intended primarily to aid the government rather than veterans. Both the accuracy and significance of that observation are open to question, for the Gatter court's conclusion is only partly correct. Section 1816(a) benefits the government and veterans as well.

As part of the Serviceman's Readjustment Act, Act of June 23, 1944, c. 268 (repealed and reenacted as Chapter 37, Title 38, U.S.C. by Public Law 85-857, 72 Stat. 1212 (1958)), Section 1816(a) is part of an act that "evinces an intent to treat mortgagors favorably." Fitzgerald v. Cleland, 650 F.2d 360, 362 (1st Cir. 1981). This Court has often held that statutory language must be read in light of an entire act. Richards v. U.S., 369 U.S. 1, 11 (1962), U.S. v. Witkovich, 353 U.S. 194, 199 (1957). Therefore,

an overall intent to aid veterans cannot be denied.

This design is supported further by the best interpretor of legislative intent, the agency itself. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.") The VA's own manual states that assignment of a loan serves three objectives:

(1) Liquidation of the loan, by the VA at a minimum of expense;

(2) Avoiding the liquidation of the loan, and thereby assisting a worthy veteran to retain his property, with the VA in no worse position by reason of the refunding, or

> (3) Avoiding liquidation of the loan and the acquisition of the property in any case where it would be to the interests of the Government to do so, irrespective of whether the homeowner is the original veteran or a transferee.
>
> VA Manual M26-3, Change 32, § 2.39 (emphasis added).

Thus, as the VA recognizes, one of the objectives served by assignment is benefiting worthy veterans facing foreclosure.

That assignment also serves governmental objectives does not give the VA carte blanche to ignore the law. Undeniably, as the VA itself acknowledges, assignment can be used to aid worthy veterans. It simply makes no sense to

allow the VA to refuse to exercise its discretion under the statute because the statute is also designed to aid the government.

In addition, aiding a veteran and protection of government interests are not mutually exclusive. One result does not negate the other.

By allowing the VA to ignore the assignment statute, the Court of Appeals has helped eliminate the only remedy available to the VA which helps a veteran faced with foreclosure by a recalcitrant lender. While the VA may suspend lenders from the home loan guaranty program because of inadequate servicing practices, that prospective remedy is small comfort to an individual veteran who has lost his or her home. Moreover, as with the assignment option, from 1974 to 1976, the VA

never suspended a lender on these grounds. Finding of Fact 46, Appendix at 104. Other statutes and handbooks allow the VA to try to persuade lenders to grant forebearance, but only through the assignment statute may the VA require it. Allowing the VA to disarm itself of its only means of aiding individual veterans makes a mockery of legislation intended to benefit veteran homeowners.

CONCLUSION

The decision below tampers with the delicate balance between the legislative and executive branches; threatens to resurrect the discredited notion that administrative agencies enforcing discretionary statutes are free to refuse to exercise their discretion; and thwarts

the Congressional goal of aiding the nation's many veteran homeowners. For each of these reasons, the Ranks request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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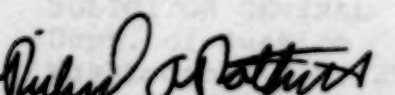
By 
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